Congressional Research Service
Informing the legislative debate since 1914

Abortion and the Patient Protection and Affordable Care Act

Updated April 10, 2013

Congressional Research Service
https://crsreports.congress.gov
R41013

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The Patient Protection and Affordable Care Act ("Affordable Care Act") includes provisions that address the coverage of abortion services by qualified health plans that will be available through health benefit exchanges beginning in 2014. These provisions have been controversial, particularly with regard to the use of premium tax credits or cost-sharing subsidies to obtain health coverage that includes coverage for elective, non-therapeutic abortion services. The Affordable Care Act addresses abortion coverage by the exchange plans with reference to the so-called "Hyde Amendment," which permits the use of federal funds appropriated for the Department of Health and Human Services ("HHS") to pay for an abortion only if the pregnancy is the result of an act of rape or incest, or if a woman's life would be endangered if the abortion were not performed. The Affordable Care Act permits exchange plans to cover both elective abortions and abortions for which federal funds appropriated for HHS are permitted, but requires plan issuers and enrollees to comply with funding segregation requirements if such plans are offered and selected.

Following the Affordable Care Act's enactment, Executive Order No. 13535 was issued to "establish an adequate enforcement mechanism to ensure that federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered)." The executive order, *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act*, required the Director of the Office of Management and Budget and the HHS Secretary to develop a model set of segregation guidelines for state health insurance commissioners to use when determining whether exchange plans are complying with the Affordable Care Act's segregation requirements.

After the enactment of the Affordable Care Act, some also questioned whether elective abortions could be covered by health benefit plans offered in the temporary high risk health insurance pool program established by the law. The issuance of an interim final rule by HHS, however, appears to have settled that question. Health benefit plans in the program cannot cover abortion services except when the life of a woman would be endangered or when a pregnancy is the result of an act of rape or incest.

Contents

Contacts

Enacted on March 23, 2010, the Patient Protection and Affordable Care Act ("Affordable Care Act") includes provisions that address the coverage of abortion services by qualified health plans that will be available through health benefit exchanges ("exchanges") beginning in 2014.[1] The Affordable Care Act's abortion provisions have been controversial, particularly with regard to the use of premium tax credits or cost-sharing subsidies to obtain health coverage that includes coverage for elective abortion services.

This report reviews the Affordable Care Act's abortion provisions and provides background information on the so-called "Hyde Amendment," which restricts the use of federal funds appropriated for the Department of Health and Human Services ("HHS") to pay for elective abortion services provided through the Medicaid program. The Affordable Care Act addresses abortion coverage by the exchange plans with reference to the Hyde Amendment. The report also examines the coverage of elective abortions in the temporary high risk health insurance pool program established by the Affordable Care Act.

Background

In 1973, the U.S. Supreme Court concluded that a woman has a constitutional right to choose whether to terminate her pregnancy.[2] Although a state cannot prohibit a woman from having an abortion, it can promote its interest in potential human life by regulating, and even proscribing, abortion after fetal viability so long as it allows an exception for abortions that are necessary for the preservation of the life or health of the mother.[3] These abortions are sometimes referred to as "medically necessary abortions" or "therapeutic abortions." Following the Court's decision in *Roe v. Wade*, Congress responded by adding restrictions on the use of federal funds to pay for abortions. In 1976, Representative Henry J. Hyde offered an amendment to the Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, that restricted the use of appropriated funds to pay for abortions provided through the Medicaid program.[4]

The Hyde Amendment and similar funding restrictions were challenged almost immediately after their adoption. In 1977, in three related decisions, the Court concluded that states have neither a statutory nor constitutional obligation to fund elective abortions or provide access to public facilities for such abortions. In *Beal v. Doe*, the Court held that nothing in the language or legislative history of Title XIX of the Social Security Act (Medicaid) requires a participating state to fund every medical procedure falling within the delineated categories of medical care.[5] The Court ruled that it was not inconsistent with the act's goals to refuse to fund unnecessary medical services. The Court did indicate, however, that Title XIX left a state free to include coverage for elective abortions should it choose to do so.

Similarly, in *Maher v. Roe*, the Court held that the Equal Protection Clause of the Fourteenth Amendment does not require a state participating in the Medicaid program to pay expenses

[1] For additional information on health benefit exchanges, see CRS Report R40942, *Private Health Insurance Provisions in the Patient Protection and Affordable Care Act (PPACA)*, by Hinda Chaikind and Bernadette Fernandez (describing health benefit exchanges as facilitating the purchase of health insurance by providing qualified individuals and small businesses with access to qualified health plans in a comparable way).

[2] Roe v. Wade, 410 U.S. 113 (1973). For additional information on the Supreme Court's abortion jurisprudence, see CRS Report RL33467, *Abortion: Judicial History and Legislative Response*, by Jon O. Shimabukuro.

[3] *Roe*, 410 U.S. at 164-65.

[4] P.L. 94-439, §209, 90 Stat. 1418, 1434 (1976) ("None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.").

[5] 432 U.S. 438 (1977).

incident to elective abortions simply because the state has made a policy choice to pay expenses incident to childbirth.[6] The Court maintained that Connecticut's policy of favoring childbirth over abortion did not impinge upon the fundamental right of privacy recognized in *Roe*, which protects a woman from undue interference in her decision to terminate a pregnancy.

Finally, in *Poelker v. Doe*, the Court upheld a municipal regulation that denied indigent pregnant women elective abortions at public hospitals.[7] The Court also concluded that staffing those hospitals with personnel opposed to the performance of abortions did not violate the Equal Protection Clause.

In 1980, the Court considered another case involving the public funding of abortion. Unlike the 1977 cases, however, *Harris v. McRae* involved restrictions on the governmental funding of medically necessary abortions.[8] In *McRae*, the Court found that the Hyde Amendment did not violate either the due process or equal protection guarantees of the Fifth Amendment, or the Establishment Clause of the First Amendment. The *McRae* Court also upheld the right of a state participating in the Medicaid program to fund only those medically necessary abortions for which it received federal reimbursement. In a companion case raising similar issues, the Court further held that an Illinois statutory funding restriction that was comparable to the Hyde Amendment did not contravene the constitutional restrictions of the Equal Protection Clause of the Fourteenth Amendment.[9]

In 1992, the Court adopted a new "undue burden" standard for evaluating the legitimacy of government restrictions on abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court indicated that it would find an abortion regulation unconstitutional if it imposes an undue burden on a woman's ability to have an abortion.[10] The Court explained that an undue burden is a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[11] Although the Court has not considered another case involving the public funding of abortion since *Casey*, its discussion of *Maher* and *McRae* in the development of the new standard would seem to suggest that funding restrictions like those found in the two cases would not be found to impose an undue burden.[12] The *Casey* Court emphasized: "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[13] The Court's abortion funding decisions suggest that the abortion funding provisions included in the Affordable Care Act would probably survive constitutional challenge.

---

[6] 432 U.S. 464 (1977).

[7] 432 U.S. 519 (1977).

[8] 448 U.S. 297 (1980).

[9] *See* Williams v. Zbaraz, 448 U.S. 358 (1980).

[10] 505 U.S. 833 (1992).

[11] *Id*. at 877.

[12] Since 1992, the Supreme Court has issued five substantive decisions involving abortion: *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (finding Montana statute restricting the performance of abortions to licensed physicians did not impose an undue burden); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding Montana's Parental Notice of Abortion Act); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (concluding that Nebraska "partial-birth" abortion statute imposed an undue burden); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (declining to invalidate New Hampshire's Parental Notification Prior to Abortion Act); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal Partial-Birth Abortion Ban Act of 2003).

[13] *Casey*, 505 U.S. at 874.

Abortion and Health Reform

In addressing the coverage of abortion services by qualified health plans offered through an exchange, the Affordable Care Act refers to the Hyde Amendment to distinguish between two types of abortions: abortions for which federal funds appropriated for HHS may be used, and abortions for which such funds may not be used. Under the Hyde Amendment, funds appropriated for HHS may be used to pay for an abortion if a pregnancy is the result of an act of rape or incest, or if a woman's life would be endangered if an abortion were not performed. Such funds may not be used, however, for elective abortions. Under the Affordable Care Act, individuals who receive a premium tax credit or cost-sharing subsidy will be permitted to select a qualified health plan that includes coverage for elective abortions. However, to ensure that funds attributable to such a credit or subsidy are not used to pay for elective abortion services, the Affordable Care Act prescribes payment and accounting requirements for plan issuers and enrollees.

Under the Affordable Care Act, the issuer of a qualified health plan will determine whether to provide coverage for either elective abortions or abortions for which federal funds appropriated for HHS are permitted.[14] It appears that a plan issuer could also decide not to cover either type of abortion. The Affordable Care Act also permits a state to prohibit abortion coverage in exchange plans by enacting a law with such a prohibition.[15] It is believed that at least 20 states now have laws that restrict abortion coverage in their exchanges.[16]

The Affordable Care Act indicates that an issuer of a qualified health plan that provides coverage for elective abortions cannot use any funds attributable to a premium tax credit or cost-sharing subsidy to pay for such services.[17] The issuer of a qualified health plan that provides coverage for elective abortions will be required to collect two separate payments from each enrollee in the plan: one payment that reflects an amount equal to the portion of the premium for coverage of health services other than elective abortions; and another payment that reflects an amount equal to the actuarial value of the coverage for elective abortions.[18] The plan issuer will be required to deposit the separate payments into separate allocation accounts that consist solely of each type of payment and that are used exclusively to pay for the specified services.[19] State health insurance commissioners will ensure compliance with the segregation requirements in accordance with applicable provisions of generally accepted accounting requirements, Office of Management and Budget ("OMB") circulars on funds management, and Government Accountability Office guidance on accounting.[20]

To determine the actuarial value of the coverage for elective abortions, the plan issuer will estimate the basic per enrollee, per month cost, determined on an average actuarial basis, for including such coverage.[21] The estimate may take into account the impact on overall costs of including coverage for elective abortions, but cannot take into account any cost reduction

[14] 42 U.S.C. §18023(b)(1)(A)(ii).

[15] 42 U.S.C. §18023(a)(1).

[16] *See* Guttmacher Inst., *Restricting Insurance Coverage of Abortion*, *at* http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf (2013).

[17] 42 U.S.C. §18023(b)(2)(A).

[18] 42 U.S.C. §18023(b)(2)(B).

[19] 42 U.S.C. §18023(b)(2)(C).

[20] 42 U.S.C. §18023(b)(2)(E).

[21] 42 U.S.C. §18023(b)(2)(D)(i).

estimated to result from such services, such as prenatal care, delivery, or postnatal care.[22] The per month cost will have to be estimated as if coverage were included for the entire population covered, but cannot be less than $1 per enrollee, per month.

Under the Affordable Care Act, a qualified health plan that provides coverage for elective abortions will also be required to provide notice of such coverage to enrollees as part of a summary of benefits and coverage explanation at the time of enrollment.[23] The notice, any plan advertising used by the issuer, any information provided by the exchange, and any other information specified by the Secretary will provide information only with respect to the total amount of the combined payments for elective abortion services and other services covered by the plan.

The Affordable Care Act also provides for conscience protection and the preservation of certain state and federal abortion-related laws. The Affordable Care Act prohibits exchange plans from discriminating against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.[24] State laws concerning the prohibition or requirement of coverage or funding for abortions, and state laws involving abortion-related procedural requirements are not preempted.[25] Federal conscience protection and abortion-related antidiscrimination laws, as well as Title VII of the Civil Rights Act of 1964, are also not affected.[26]

Following the Affordable Care Act's enactment, Executive Order No. 13535 was issued to "establish an adequate enforcement mechanism to ensure that federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered)."[27] The executive order directed the OMB Director and HHS Secretary to develop a model set of segregation guidelines for state health insurance commissioners to use when determining whether exchange plans are complying with the Affordable Care Act's segregation requirements.[28] The executive order also directed the HHS Secretary to "ensure that program administrators and recipients of Federal funds are aware of and comply with the limitations on abortion services imposed on [community health centers] by existing law."[29]

Abortion and High Risk Pools Under the Affordable Care Act

Section 1101 of the Affordable Care Act provides for the establishment of a temporary high risk health insurance pool program for specified individuals with preexisting conditions between the date on which the program is established and January 1, 2014. Pursuant to Section 1101(g)(1), $5 billion is appropriated to the HHS Secretary, out of any moneys in the Treasury not otherwise appropriated, to pay claims against the high risk pool that are in excess of the premium amounts

[22] 42 U.S.C. §18023(b)(2)(D)(ii).

[23] 42 U.S.C. §18023(b)(3).

[24] 42 U.S.C. §18023(b)(4).

[25] 42 U.S.C. §18023(c).

[26] *Id*.

[27] Exec. Order No. 13535, §1, 75 Fed. Reg. 15,599 (March 24, 2010).

[28] *See id.* §2.

[29] *See id*. §3.

collected from enrollees.[30] The Affordable Care Act does not specify what benefits may or may not be subsidized with federal funds appropriated under Section 1101(g)(1).

The Affordable Care Act's abortion restrictions do not appear to apply specifically to the funds made available for high risk pools by Section 1101. These restrictions prohibit an issuer of a qualified health plan that will be available in an exchange from using funds attributable to a premium tax credit or cost-sharing subsidy to pay for elective abortion services, if such services are covered by the plan. In addition, the Hyde Amendment would not seem to apply to the funds available under Section 1101(g)(1), and the existing HHS regulations that apply to programs or projects administered by the Public Health Service would also not appear to apply to such funds. It does not appear that the high risk health insurance pool program established by the Affordable Care Act will be administered by that agency.[31]

Section 1101, however, requires high risk pools to meet specified requirements, including "any other requirements determined appropriate by the Secretary."[32] On July 30, 2010, HHS promulgated an interim final rule to administer the Affordable Care Act's temporary high risk health insurance pool program.[33] The rule indicates that health benefit plans in the program cannot cover abortion services except when the life of a woman would be endangered or when a pregnancy is the result of an act of rape or incest.[34] In issuing the rule, HHS noted the following:

> The enactment of the Affordable Care Act left in place current restrictions that prohibit the use of Federal funds for abortion services, except in cases of rape or incest, or where the life of the woman would be endangered.... These restrictions currently apply to certain Federal programs that are similar to the [temporary high risk health insurance pool program].... As such, the services covered by the [program] shall not include abortion services except in the case of rape or incest, or where the life of the woman would be endangered.[35]

The rule became effective on July 30, 2010.

Author Information

Jon O. Shimabukuro
Legislative Attorney

[30] 42 U.S.C. §18001(g)(1).

[31] *See* 42 C.F.R. §50.301.

[32] 42 U.S.C. §18001(c)(2)(D).

[33] *See* Pre-Existing Condition Insurance Plan Program, 75 Fed. Reg. 45,014 (July 30, 2010) (to be codified at 45 C.F.R. pt. 152).

[34] 45 C.F.R. §152.19(b)(4).

[35] 75 Fed. Reg. at 45,018.

Disclaimer